Supreme Court, U.S.
FILED
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No. 02-426

IN THE

Supreme Court of the United States

TERESA BALLARD, KENISHA BRYANT
and CHERYL KING,

Petitioners,

v.

PHYLLIS GARRETT and ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT**

BRIEF IN OPPOSITION FOR RESPONDENT ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Advance America, Cash Advance Centers of Arkansas, Inc., is wholly owned by Advance America, Cash Advance Centers, Inc.

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Appendix B — Joint Motion To Vacate Order Requiring Objectors To Post Supersedeas Bond Of The Circuit Court Of Clark County, Arkansas Dated And Filed November 12, 2002 ..... 3a

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") submits this Opposition to the Petition for Writ of Certiorari filed by Petitioners Teresa Ballard, Kenisha Bryant and Cheryl King ("the Petition"). Petitioners ask this Court to review the judgment of the Arkansas Supreme Court dismissing their appeal from a trial court order requiring that they post a supersedeas bond. For the following reasons, the Petition should be denied.

STATEMENT OF FACTS

The underlying class action was filed on October 12, 1999. After eighteen months of contentious litigation, and two interlocutory appeals to the Arkansas Supreme Court, the parties were able to negotiate a proposed settlement. The trial court approved the proposed settlement on July 18, 2001, over the objections of the three Petitioners.[1] Thereafter, the Petitioners appealed to the Arkansas Supreme Court from the trial court's approval of the settlement and from the trial court's order denying their motion to intervene.

After Petitioners noted their appeals to the Arkansas Supreme Court, the class representative, Phyllis Garrett, moved the trial court for an order requiring the Petitioners to post a supersedeas bond to protect the interests of the class

1. Court-approved notice of the proposed settlement was mailed to over 19,200 potential class members. Four class members opted out of the settlement. Four other class members, three of whom are the Petitioners herein, chose not to opt of the settlement and moved to intervene for purposes of objecting to the proposed settlement. Their motion to intervene was denied by the trial court as untimely, but they were nonetheless permitted to appear at the fairness hearing, where they stated their objections and argued by counsel against approval of the settlement.

while the Petitioners appealed the settlement approval. On September 5, 2001, the trial court granted Garrett's motion and ordered Petitioners to post a $750,000 supersedeas bond, which was the amount of the cash component of the settlement as approved by the trial court. On September 20, 2001, Petitioners noted a third appeal to the Arkansas Supreme Court from the order requiring them to post a bond.

Petitioners never posted the bond as ordered. So, on November 2, 2001, Garrett filed a motion in the trial court seeking to hold Petitioners in contempt of court for refusing to post the bond. On November 9, 2001, Petitioners petitioned the Arkansas Supreme Court for a writ of prohibition or certiorari prohibiting the trial court from requiring them to post the bond. The Arkansas Supreme Court denied that petition, and held that the trial court did have jurisdiction to order the posting of the supersedeas bond to protect the interests of the class. *See Ballard v. Clark County Circuit Court*, 347 Ark. 291, 294, 61 S.W.3d 178, 180 (2001).

On May 9, 2002, the Arkansas Supreme Court dismissed Petitioners' appeal of the order requiring them to post a bond. *See Luebbers v. Advance America, Cash Advance Centers of Arkansas, Inc.*, 348 Ark. 567, 573, 74 S.W.3d 608, 611 (2002).

On May 29, 2002, Petitioners filed a petition for rehearing with the Arkansas Supreme Court, raising for the first time due process and equal protection challenges. On June 12, 2002, the Petitioners filed a motion to amend their petition for rehearing, citing for the first time this Court's decision in *Devlin v. Scardelletti*, 536 U.S. __, 122 S. Ct. 2005 (2002). The petition for rehearing and the motion to amend were both denied by the Arkansas Supreme Court.

The Arkansas Supreme Court issued its mandate on this appeal on June 13, 2002. However, the Petitioners moved for a recall and stay of the mandate for ninety days to allow them to petition this Court for a writ of certiorari. The Arkansas Supreme Court granted the motion, the mandate was recalled, and its re-issuance was stayed for ninety days. During the stay of the mandate, the Petitioners filed their Petition for Writ of Certiorari with this Court.

On October 2, 2002, the trial court ruled on Garrett's contempt motion that had been filed on November 2, 2001. The trial court declined to hold Petitioners in contempt for refusing to post the bond. (App. A).

On October 4, 2002, the Petitioners moved in the Arkansas Supreme Court for a continuance of the stay of the mandate on the bond appeal, which Advance America opposed. On October 31, 2002, the Arkansas Supreme Court denied Petitioners' motion to continue the stay of the mandate on the bond appeal. The Arkansas Supreme Court then issued its mandate to the clerk of the Circuit Court of Clark County, Arkansas, returning jurisdiction to the trial court.

On November 12, 2002, Garrett and Advance America jointly moved the trial court to vacate the bond order because no bond has been or will be posted; and because vacating the order would benefit the class by bringing finality to the litigation and permitting execution of the court-approved settlement to move forward. (App. B). The trial court granted the motion to vacate and vacated its bond order on November 18, 2002.

REASONS FOR DENYING THE PETITION

The issue raised by the Petitioners is now moot. The Petitioners have never complied with the order to post a supersedeas bond. Since the filing of the Petition, the trial court has declined to hold Petitioners in contempt for failing to post the bond, so the threat of contempt is no longer present. (App. A). All three of the Petitioners' state court appeals have now been dismissed, making the bond no longer necessary to protect the interests of the class. Therefore, the parties to the underlying class action jointly moved the trial court to vacate its bond order, which the trial court did on November 18, 2002. (App. B). Ironically, this appeal over a bond that was initially intended to protect the class, is now the only thing preventing the class members from receiving the settlement benefits to which they are entitled. The Petitioners, who have tried to derail the settlement at every opportunity, are further delaying it by attempting yet another appeal to this Court related to an order that they have not complied with, and will never have to comply with now that the threat of contempt has been removed and the order vacated.

Second, there is no compelling reason to grant the Petition because the judgment of the Arkansas Supreme Court does not conflict with this Court's holding in *Devlin v. Scardelletti*, 536 U.S. __, 122 S. Ct. 2005 (2002). The Petitioners did not raise *Devlin* or any federal constitutional issues in the Arkansas Supreme Court until *after* their appeal had been dismissed. Even then, their reliance on *Devlin* was and still is completely misplaced. *Devlin* holds that for the limited purpose of appealing from a district court's approval of a federal class action settlement, intervention by an otherwise timely objector to the settlement is not required. *Devlin* does not hold, as Petitioners argue, that timely objectors to state class action settlements are

"parties" or may stand in the shoes of "parties" for all purposes and on all issues. Additionally, *Devlin* did not involve the issue presented here, which is whether intervention at the trial court level is required for objectors to appeal from a trial court order entered under Arkansas Rule of Appellate Procedure 8 requiring them to post a supersedeas bond.

I.

THE ISSUE PRESENTED BY THE PETITION IS MOOT.

This Court is not in the business of entertaining cases in which the issue has become moot. *See Sears, Roebuck and Co. v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union, et al.*, 397 U.S. 655, 657, 90 S. Ct. 1299, 1300 (1970) ("To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain."); *see also Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200 (1969); *Golden v. Zwicker*, 394 U.S. 103, 89 S. Ct. 956 (1969). Petitioners ask the Court to abandon this well settled practice.

On September 5, 2001, the trial court ordered Petitioners to post a supersedeas bond to protect the interests of the class while the execution of the settlement was stayed pending the outcome of Petitioners' multiple appeals. The Petitioners refused to post the bond, and proceeded with three separate appeals to the Arkansas Supreme Court anyway. All three of Petitioners appeals have now been dismissed for reasons having nothing to do with their failure to post a bond, leaving the parties poised to proceed with execution and administration of the settlement.

Also, the trial court that entered the bond order recently declined to hold the Petitioners in contempt for refusing to post the bond. (App. A). The parties to the class action settlement have also recently filed a joint motion with the trial court to vacate the bond order altogether, given that no bond has ever been posted, none will ever be posted, and the need for one no longer exists. (App. B). The trial court granted the motion to vacate and vacated the bond order on November 18, 2002. Even though Petitioners never posted the bond, and even though the Arkansas Supreme Court held that the trial court had jurisdiction to order posting of the bond, the Petitioners were still permitted to appeal the settlement approval and the denial of their intervention motion to the Arkansas Supreme Court. The trial court's order requiring a bond had no adverse effect whatsoever on Petitioners' ability to pursue their appeals to the Arkansas Supreme Court. The Petitioners have not suffered and will not suffer any deprivation of a liberty or property interest by reason of their defiance of that order, or by the Arkansas Supreme Court's dismissal of their appeal from that order. In short, the Petitioners are attempting to appeal from a judgment that let stand an order they have not complied with, are no longer required to comply with, and from which they have not been aggrieved. Under these circumstances, granting the Petition would be a waste of judicial resources and would abandon the long-standing practice of this Court to refrain from deciding issues that are moot.

II.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S OPINION IN *DEVLIN.*

The Arkansas Supreme Court dismissed Petitioners' appeal of the bond order on May 9, 2002. *Devlin* was decided on June 10, 2002. Prior to the dismissal of their appeal, the Petitioners never raised in the trial court or the Arkansas Supreme Court any federal constitutional questions, and they certainly did not argue the *Devlin* decision because it did not then exist.

As Petitioners acknowledge, they first raised their constitutional concerns in a petition for rehearing filed in the Arkansas Supreme Court after dismissal of their appeal, and first raised *Devlin* in a motion to amend their petition for rehearing filed over a month after their appeal had already been dismissed.

The late assertion of these arguments notwithstanding, *Devlin* clearly has no application to the issue presented by the Petition, and the decision of the Arkansas Supreme Court dismissing Petitioners' appeal of the bond order does not conflict with *Devlin.*

In *Devlin*, this Court was faced with the question of whether an objector, who did not have the ability to opt out of a federal class action settlement, must first intervene in order to appeal the district court's approval of the settlement over his timely objections. The Court held that unnamed class members, who have timely objected to approval of a federal class action settlement, may appeal the settlement approval

without first intervening. *See Devlin*, 536 U.S. at __, 122 S. Ct. at 2013. *Devlin* does not hold, as Petitioners argue, that timely objectors to state class action settlements are "parties" or may stand in the shoes of "parties" for all purposes and on all issues.

As the Arkansas Supreme Court correctly recognized, *Devlin* also involved facts and issues that are distinguishable from those presented in this case and by the Petition. *Devlin* involved an appeal from a district court's approval of a class action settlement under the Federal Rules of Civil Procedure. By contrast, this case involves an appeal from an order entered under Arkansas Rule of Appellate Procedure 8 requiring the objectors to post a supersedeas bond to protect the interests of the class while they appealed the approval of a state class action settlement. Thus, the Petition before this Court raises questions of Arkansas state law and procedure in Arkansas state courts.

Another distinguishing factor is that a significant concern for the majority in *Devlin* was the right of unnamed class members, who had timely objected to a settlement, to protect their own interests in a settlement by which they would be bound. *See Devlin*, 536 U.S. at __, 122 S. Ct. at 2011. This was a particular concern in *Devlin* because the federal class action there had been certified under Rule 23(b)(1) of the Federal Rules of Civil Procedure, so the objecting class member did not have the ability to opt out of the settlement. *See id.* Because he was not able to opt out of the class, appealing the approval of the settlement was the only means by which the objector could protect himself from being bound by a settlement to which he objected. *See id.*

Unlike the objecting class member in *Devlin*, the Petitioners here had the ability to opt out of the settlement and avoid being bound by it. Indeed, the Petitioners were ideally positioned to opt of the settlement because they already had their own action pending against Advance America for the same relief (and then some) as sought by the class representative in this litigation.[2] By attempting to intervene at the last minute, rather than opt out of a settlement to which they objected, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to meet the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the trial court. Petitioners' strategic election not to opt out of the settlement, plus their failure to meet the requirements of Arkansas Rule of Civil Procedure 24(a), further distinguishes this matter from *Devlin*.

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2. At the time they moved to intervene, the Petitioners were named plaintiffs in another putative class action against Advance America. *See Ballard, et al. v. AA Check Cashiers, et al.*, No. CIV-00-5100 (W.D. Ark. 2000). That case was dismissed by the district court in November 2000 for failure to state a claim and for lack of subject matter jurisdiction. Petitioners were appealing that dismissal to the U.S. Court of Appeals for the Eighth Circuit at the time they sought to intervene in this matter. The Eighth Circuit Court of Appeals later affirmed the dismissal by the district court. *See Ballard, et al. v. AA Check Cashiers, et al.*, 2001 WL 1117558 (8th Cir. 2001).

CONCLUSION

For all of the foregoing reasons, Advance America respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS DENYING PLAINTIFF'S MOTION FOR CONTEMPT DATED OCTOBER 2, 2002

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

CIV-99-152

PHYLLIS GARRETT, *individually and o/b/o a class of other similarly situated persons*

PLAINTIFFS

VS.

ADVANCE AMERICA CASH ADVANCE CENTERS OF ARKANSAS, INC.

DEFENDANT

ORDER

Comes on now for hearing, the above-styled matter, and the Court being well and sufficiently advised and having considered the arguments, briefs and affidavits filed by the parties does hereby find as follows:

The objectors have never personally appeared at any hearings or proceedings before this Court. Pending before the Court is the Plaintiff's motion to hold the objectors in contempt of this Court's September 5, 2002 Order.

Appendix A

The objectors' appeals have been dismissed by the Arkansas Supreme Court and this Court's orders have been affirmed. Based on the pleadings, arguments and evidence before the Court, the Plaintiff's motion for contempt is hereby denied.

IT IS SO ORDERED.

s/ John A. Thomas
HON. JOHN A. THOMAS

10/2/02
DATE

APPENDIX B — JOINT MOTION TO VACATE ORDER REQUIRING OBJECTORS TO POST SUPERSEDEAS BOND DATED AND FILED NOVEMBER 12, 2002

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

CIV-99-152

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons

PLAINTIFF

vs.

ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

DEFENDANT

JOINT MOTION TO VACATE ORDER REQUIRING OBJECTORS TO POST SUPERSEDEAS BOND

Plaintiff, Phyllis Garrett, and defendant, Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America"), jointly move the Court to vacate its order of September 5, 2001, requiring Teresa Ballard, Kenisha Bryant and Cheryl King ("the Objectors"), to post a supersedeas bond in the amount of $750,000.

Appendix B

I. INTRODUCTION

This Court approved the class action settlement in this action on July 18, 2001, over the objections of the Objectors. Thereafter, the Objectors appealed to the Arkansas Supreme Court from this Court's approval of the settlement and from this Court's denial of their motion to intervene.[1]

After the Objectors noted their appeals, plaintiff, Phyllis Garrett moved this Court for an order requiring the Objectors to post a supersedeas bond to protect the interests of the class while the Objectors' appealed the settlement approval. On September 5, 2001, this Court entered an order requiring the Objectors to post a supersedeas bond in the amount of $750,000. On November 9, 2001 the Objectors petitioned the Arkansas Supreme Court for a writ of prohibition or certiorari prohibiting this Court from requiring them to post the bond. On December 13, 2001, the Arkansas Supreme Court denied the Objectors' petition for a writ of prohibition or certiorari, and held that this Court had jurisdiction to order the posting of the supersedeas bond. *See Ballard v. Clark County Circuit Court*, 347 Ark. 291, 294, 61 S.W.3d 178, 180 (2001). Despite this ruling of the Arkansas Supreme Court, the Objectors steadfastly refused to post the bond, so Garrett filed a motion in this Court on November 2, 2001, seeking to hold the Objectors in contempt of court for refusing

1. The Objectors' appeal challenging the settlement approval was dismissed for lack of standing. *See Ballard v. Advance America, Cash Advance Centers of Arkansas, Inc.*, 349 Ark. 545, 79 S.W.3d 835 (July 5, 2002). The Arkansas Supreme Court affirmed this Court's denial of the Objector's motion to intervene. *See Ballard v. Garrett*, 349 Ark. 371, 78 S.W.3d 73 (Jun. 20, 2002).

to post the bond as ordered. This Court held a hearing on the contempt motion on January 14, 2002, and entered an order on October 2, 2002, declining to hold the Objectors in contempt.

On September 20, 2001, the Objectors appealed to the Arkansas Supreme Court from this Court's September 5, 2001 order requiring them to post a bond ("the bond appeal"). The Arkansas Supreme Court dismissed the bond appeal on May 9, 2002 for lack of standing. *See Luebbers v. Advance America, Cash Advance Centers of Arkansas, Inc.*, 348 Ark. 567, 74 S.W.3d 608 (2002). The Arkansas Supreme Court issued its mandate on the bond appeal on June 13, 2002; however, the Objectors moved in the Arkansas Supreme Court for a recall and stay of the mandate for ninety (90) days to allow them to pursue an appeal in the United States Supreme Court. The Arkansas Supreme Court granted the motion, the mandate was recalled, and its re-issuance was stayed for 90 days. The Objectors then filed a petition for writ of certiorari in the United States Supreme Court. That petition has not yet been ruled upon, and Advance America's opposition to the petition is due November 18, 2002 in the U.S. Supreme Court.

On October 4, 2002, the Objectors moved in the Arkansas Supreme Court for a continuance of the stay of the mandate on the bond appeal, which Advance America opposed. On October 31, 2002, the Arkansas Supreme Court denied the Objectors' motion to further continue the recall of the mandate on the bond appeal. The mandate on the bond appeal was issued to the Clerk of this Court on October 31, 2002, restoring jurisdiction of this matter to this Court.

Appendix B

II. ARGUMENT

A. *This Court Has Jurisdiction To Vacate Its September 5, 2001 Order.*

The filing of the mandate by the Arkansas Supreme Court with the Clerk of this Court restored jurisdiction to this Court. While there is a petition for writ of certiorari pending in the United States Supreme Court, the exercise of jurisdiction by the U.S. Supreme Court is entirely discretionary and depends on the granting of the writ of certiorari. *See Hammerstein v. Superior Court of California, et al.*, 341 U.S. 491, 492 (The exercise of U.S. Supreme Court jurisdiction is determined by issuance of a writ of certiorari, which is discretionary.); see also SUP. CT. R. 10 (Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons). No writ of certiorari has been granted here. The U.S. Supreme Court has not exercised jurisdiction over this matter, and may never do so. Nor has the Supreme Court taken any action that would prevent this Court's exercising its jurisdiction to vacate its own order.

In Arkansas, a trial court has jurisdiction to set aside or modify an order or judgment after the mandate of an appellate court has been returned. *See Davis v. Davis*, 291 Ark. 473, 477, 725 S.W.2d, 845, 847 (1987). The trial court may modify, vacate or set aside its judgment even though the judgment has been affirmed on appeal. *See Garrett v. Allstate Ins. Co.*, 26 Ark. App. 199, 201, 762 S.W.2d 3, 5 (1988). Also, the prohibition of a supersedeas is removed by dismissal of the appeal that gave rise to the supersedeas. *See Searcy Steel*

Appendix B

Co. v. Mercantile Bank of Johnsboro, 19 Ark. App. 220, 226, 799 S.W.2d 277, 281 (1986). Because all of the Objectors' appeals have been dismissed by the Arkansas Supreme Court, and the mandate on the bond appeal has been returned to the Clerk of this Court, this Court has jurisdiction to vacate the September 5, 2001 bond order as requested.

B. *The Court Should Vacate Its September 5, 2001 Order Requiring The Objectors To Post Bond.*

The purpose of this Court's order requiring Objectors to post a bond was to protect the interests of the class by insuring that the cash component of the settlement would still be available if and when the Objectors' appeals failed. All three of the Objectors' appeals to the Arkansas Supreme Court have now been dismissed, leaving the parties poised to proceed with execution and administration of the settlement. However, the execution and administration of the settlement cannot go forward because the Objectors are attempting yet another last ditch appeal to the U.S. Supreme Court from an order of this Court that they have never obeyed and have no intention of ever obeying. Because this Court recently declined to hold the Objectors in contempt for not posting the bond, the Objectors can continue to defy this Court's order with Impunity and without consequences to themselves. The Objectors are now using their continued defiance of this Court's order as an affirmative tactic to manufacture another appeal and further delay execution of the settlement to the detriment of the other 19,000 class members who have already waited more than a year to receive their settlement benefits. The class has waited long enough, and the games being played by the Objectors need to stop.

Appendix B

This Court had the best interests of the class in mind when it ordered the Objectors to post a bond. However, the best interests of the class have now changed, in light of the fact that the Arkansas Supreme Court has dismissed all of the Objectors' appeals, clearing the way for the settlement to go forward. The supersedeas bond is no longer necessary because the appeal that gave rise to it has now been dismissed, and the parties are ready, willing and able to proceed with execution and administration of the settlement as approved. It is unfair to the other 19,000 class members to permit the three Objectors to hold the settlement hostage by continuing to litigate over an order that they have never complied with, and no longer have to comply with now that the threat of contempt has been removed. It is now in the best interests of the class to allow the settlement to go forward. The time has come to bring finality to this litigation. Accordingly, the parties jointly move the court to vacate its September 5, 2001 order requiring the objectors to post a supersedeas bond.

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